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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

No. 78-1276

JOSEPH R. KAPP, *Petitioner,*

*v.*

NATIONAL FOOTBALL LEAGUE, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

**BRIEF FOR RESPONDENTS IN OPPOSITION**

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**BRIEF FOR RESPONDENTS IN OPPOSITION**

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Petitioner Joseph R. Kapp, a former professional football player within the National Football League (NFL), sued the NFL, its 26 member clubs and other individual defendants for alleged violations of the anti-trust laws. The complaint also asserted a breach of contract claim against the New England Patriots club and a tort claim against the other defendants for allegedly interfering with Kapp's employment arrangements with the Patriots.

The jury returned a verdict against petitioner on all of his antitrust and other claims. The Court of Ap-

peals for the Ninth Circuit affirmed,<sup>1</sup> holding (1) that the District Court properly submitted to the jury the issues of injury and causation; (2) that "the mere fact that some of the NFL's rules were found violative of the antitrust laws does not automatically produce damages" for petitioner; and (3) that the District Court properly instructed the jury on the contract and tort claims. (App. A. 7-8, 586 F.2d at 648-49.)

#### QUESTION PRESENTED

Whether the Court of Appeals erred in refusing to overturn a jury verdict because the District Court instructed that the *fact* of injury is a required element of a plaintiff's proof in an antitrust case, that private antitrust claims must be based on proof of impact and injury caused by an unreasonable trade restraint, and that it was for the jury to resolve the disputed fact issue as to the parties' intentions concerning the contract.

#### COUNTERSTATEMENT OF THE CASE

##### A. The Trial Evidence.

The facts were thoroughly developed at trial and are briefly highlighted as follows:<sup>2</sup>

Petitioner and respondent New England Patriots Football Club ("Patriots") signed two "memo agree-

<sup>1</sup> The decision of the Court of Appeals is printed as Appendix A to the Petition for Certiorari, is reported at 586 F.2d 644 (9th Cir. 1978), and will be cited as "App. A. —, 586 F.2d at —."

<sup>2</sup> Respondents refer to the record filed with the Court of Appeals as "R. —"; to the trial transcript as "Tr. —"; to plaintiff's exhibits as "Px. —"; and to defendants' exhibits as "Dx. —."

ments" in October 1970 containing the financial terms under which petitioner would play football for the Patriots for the following three years. (Px. 6). The two "memos" were to be assimilated into the Standard Player Contract, the NFL's official player-club contract form. (Dx. 158; Tr. 1238). After petitioner's accountants reviewed the payment schedule (\$600,000 over a period of three years), the financial terms were incorporated into a Standard Player Contract and forwarded to petitioner for signature in January 1971. (Dx. 69). Although petitioner signed the Standard Player Contract, it was never returned to the Patriots; petitioner played football during the 1970 season and was paid in accordance with its terms. (Tr. 1246-47, 329, 355-57, 609, 625).

In July 1971, petitioner withdrew from the Patriots' training camp in lieu of returning the Standard Player Contract and completing his contract arrangements on the NFL's official player-club contract form. (Tr. 637-45, 2494-98). Direct communications with the petitioner by the NFL Commissioner failed to elicit the source of petitioner's complaint. (Tr. 2858-61). Petitioner was offered an opportunity for a hearing to explain his objections (Dx. 143, Art. X; Dx. 144; Tr. 707-08, 3205-06), but neither petitioner nor any representative chose to appear. (Dx. 152; Tr. 3189, 1412, 2500).

At the time of these events, the use of the player-club contract form within the NFL had been established through collective bargaining and in the League's operating by-laws. The Collective Bargaining Agreement, negotiated by the NFL players' union on behalf of NFL players, expressly required that all NFL players



sign the "standard" form.<sup>3</sup> The Collective Bargaining Agreement also reserved to NFL players and their clubs the "right . . . to agree upon changes" in the Standard Player Contract form "consistent with this Agreement." (Dx. 143, Art. III, Sec. 1).

Petitioner never returned to the Patriots or sought any preliminary relief and instead embarked upon a movie career. (Tr. 559-63). Some nine months later, petitioner filed a sweeping antitrust, contract, and tort complaint challenging practically every phase of NFL player operations. While discovery was still in progress, petitioner moved for summary judgment. The District Court responded with a partial summary judgment decision resolving two complex "rule of reason" issues without trial—the NFL player selection system or "draft" and the so-called "Rozelle rule". (App. C. 27-29, 390 F. Supp. at 82-83.)<sup>4</sup> The District Court invalidated these practices and held several other league practices unlawful "insofar as" they were used to apply the draft or the Rozelle rule. (See App. A. 4, 586 F.2d at 646.)

<sup>3</sup> The Collective Agreement then provided:

"All players in the NFL shall sign the Standard Player Contract which shall be known as the 'NFL Standard Player Contract.' The Standard Player Contract shall govern the relationship between the clubs and the players, except that this Agreement shall govern if any terms of the Standard Player Contract conflict with the terms of this Agreement." (Dx. 143, Art. III, Sec. 1).

The use of the player contract form had also been approved in the preceding Collective Bargaining Agreement. (Dx. 135, Art. III, Sec. 1).

<sup>4</sup> The Memorandum of Decision by the District Court is printed as Appendix C to the Petition for Certiorari, is reported at 390 F. Supp. 73 (N.D.Cal. 1974), and will be cited as "App. C. —, 390 F. Supp. at —."

Thereafter, petitioner resisted all efforts by respondents to reopen this summary decision, which reserved for trial only the issue of "whether NFL enforcement of the rules which we have held to be patently unreasonable and illegal can be deemed to have been the cause or at least one of the causes of injury to plaintiff." (App. C. 29, 390 F. Supp. at 83.) Subsequently (without objection by petitioner), the District Court entered a final Pre-Trial Order defining the issue to be tried as

"the *impact, if any*, of said combination upon plaintiff and the extent and monetary amount of any injury to plaintiff in his business or property resulting from defendants' aforesaid combination." (R. 2392). (Emphasis supplied).

A month-long trial followed. The evidence was overwhelming that no anticompetitive practice of the League had inflicted any injury on petitioner's "business or property" or threatened him with any such injury. Indeed the trial evidence, by acknowledgment of petitioner and his principal witnesses, directly supported respondents' contentions that all NFL practices applied to petitioner were reasonable.

Among other things, the evidence established that the use of an official player-club contract form is necessary and essential to the effective functioning of a modern sports league (Tr. 2809, 2812-15); that the terms of the NFL Player Contract had been a subject of collective bargaining (Dx. 135, Art. III, Sec. 1, Art. VIII; Dx. 143, Art. III);<sup>5</sup> that collective bargaining between the

<sup>5</sup> Subsequent decisions have established that principles of NFL operation affecting the employment conditions of NFL players are "mandatory subjects" of bargaining. *Mackey v. National Football League*, 543 F.2d 606, 615 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). See also *Reynolds v. National Football League*, 584 F.2d 280, 288 (8th Cir. 1978). Cf. *Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

NFL clubs and the players' union had resulted in interpretations and modifications of and supplements to the player contract form (Tr. 2664-68, 2670-74, 2801); that the so-called NFL Standard Player Contract is not "standard" (Tr. 2810); that, by long-standing practice and tradition (confirmed in the NFL Constitution and By-Laws and by the NFL Collective Bargaining Agreement), players and clubs are entitled to negotiate changes affecting their own interests, provided they are consistent with the Collective Bargaining Agreement (Dx. 143, Art. III, Sec. 1; Tr. 2812-15); that numerous departures and deviations from the terms of the "Standard Player Contract" had been negotiated by players (including the petitioner) over the years (Tr. 2810, 1322, 1329, 2590-91); and that it was the responsibility of the NFL Commissioner (under the Collective Bargaining Agreement) to insure that players and clubs complied with the terms of the Agreement. (Dx. 143, Art. X).

The evidence also fully confirmed respondents' position that neither petitioner nor the Patriots had intended the "memo agreements" to represent a final contract (Tr. 603, 607-08, 2537-38); that petitioner had followed the same "memo agreement" procedure in negotiating prior official contracts with other professional football clubs (Dxs. 45, 47; Tr. 600, 527-28); that the Patriots' understanding that the "memo agreements" were not the final contract was contemporaneously expressed without questioning by petitioner (Dxs. 62, 158; Tr. 2467, 1377, 1380-81, 1443, 2469-72); that the memo agreements' terms were an incomplete expression of an NFL player-club employment relationship (Dx. 60; Tr. 2855-56, 609-21); that petitioner had been permitted temporarily to play in the NFL prior

to completion of his contract arrangements to permit petitioner's accountants to review the financial terms (Dx. 62; Tr. 2469-72, 2851-52); that petitioner's accountants had conducted their studies with the understanding that the financial terms were to be incorporated into the Standard Player Contract form (Tr. 607-08, 2537-38, 2543-46, 2556); and that petitioner thereafter actually signed the Standard Player Contract incorporating the financial terms of the two "memo agreements" (with petitioner's agent pigeonholing the signed contract and keeping the fact of its existence secret until discovery compelled its disclosure). (Tr. 329, 625, 1246-47, 1387-88).

In addition, the evidence demonstrated that the Rozelle rule, on the only occasion that it had been applied to petitioner in the past, had caused him no injury (Tr. 578-80, 723);<sup>9</sup> that petitioner's prior use of the standard form had never operated to his disadvantage (Tr. 394-95, 398-400, 472, 530-35); that there was no realistic prospect that the Rozelle rule would ever be applied to him again (petitioner was a veteran injury-prone quarterback of declining abilities) (Tr. 656); that use

<sup>9</sup> Petitioner, during the course of the trial, withdrew his prior claim to this effect. Compare petitioner's first formal request for jury instructions (R. 2510) and Plaintiff's Requested Instruction No. 23, filed February 19, 1976 (R. 2545-47), with the District Court's final proposed instructions, warmly embraced in relevant part by petitioner's counsel. (R. 2844-72; Tr. 3312, 3326-34). See also Tr. 1466, 1328, 1332, 1339-40.

The NFL draft has never had any bearing on this case. Petitioner had been drafted twelve years previously (Tr. 2677-79), the draft claims had thereafter been abandoned (Tr. 442-43), and petitioner had entered the NFL well before the statute of limitations period without any draft claims to his services among the clubs of three different football leagues. (Tr. 407, 442-43, 2842).



of the standard form imposed no impediments to any legal rights petitioner might wish to assert should any improper action be taken against him in the future (Tr. 1452-53); and that both the Patriots and the League had offered petitioner express written reservations of suit rights.<sup>7</sup>

The evidence also affirmed that petitioner had come to regret his transfer (on his own initiative) from a very successful NFL team to one of the least successful NFL teams (Tr. 656); that he had experienced a disastrous season (in terms of performance and loss of reputation) (Tr. 656-57, 2482); that he had grown tired of football ("Who wants to play for the worst team in the NFL," as his diary stated) (Dx. 102; Tr. 661); that he wished to attempt a movie career while he was still a public figure (Tr. 559-63); and that his lawyer-agent had persuaded him that retirement offered the potential of greater rewards than playing ("a realistic shot at millions," as his diary put it). (Dx. 104; Tr. 911-12, 1461).

On the basis of this and other evidence, the jury returned a verdict adverse to all of petitioner's claims. A motion to the District Court for a judgment notwithstanding the verdict or for a new trial was denied. On appeal, all of the District Court's instructions were carefully examined, with petitioner then contending that the District Court should have instructed the jury that he was entitled to damages as a matter of law. When this appeal was denied by a panel of the Court

<sup>7</sup> The Court of Appeals' decision expressly confirmed these facts (App. A. 8, 586 F.2d at 649) and that conclusion is fully supported by the trial evidence. (Tr. 1398-99, 2492-93, 1401-02, 1452-53, 2600-03).

of Appeals and petitioner sought a rehearing (with suggestion of rehearing *en banc*), the full Court of Appeals declined to review the panel's judgment.

#### B. The District Court's Instructions to the Jury.

When the jury trial began, three things were clear to petitioner and his counsel: (1) that the pre-trial record offered no basis for a finding that petitioner had been "boycotted" or had experienced financial injury as a matter of law; (2) that the Clayton Act (§ 4) required petitioner to prove that he had been "injured in his business or property" by respondents' antitrust violations; and (3) that impact or the fact of injury had to be proved to the jury, because the court's Pre-Trial Order, fully embraced by petitioner, stated that "the impact, if any," of respondents' violations was for the jury. The trial was conducted in full recognition of these circumstances.

As the Court of Appeals held, the District Court's instructions were properly based upon Section 4 of the Clayton Act, this Court's controlling decisions, the trial court's pre-trial rulings, and the trial record. (App. A. 7-8; 586 F.2d at 548-49.)

The essential elements of the District Court's anti-trust instructions were as follows:

The court instructed <sup>a</sup> (1) that it had found certain NFL employment principles, in whole or in some degree, to be antitrust violations (Tr. 3393-3401); (2)

<sup>a</sup> At petitioner's suggestion, the court substantially revised its proposed instructions on the eve of submitting the case to the jury (*e.g.*, Tr. 3312-13, 3319-20, 3324, 3325-26), and petitioner's counsel told the court: "I admire many of these instructions, welcome them, but I am trying to get them into a state of absolute purity

that petitioner had to prove impact or injury to his "business or property" and a causal relationship between at least one of the violations and the injury to such "business or property" (Tr. 3402); and (3) that the term "business," as used in the antitrust laws, includes a person's employment or occupation. (Tr. 3402-03). Under the instructions, "the main issue of fact" for the jury was "whether, assuming, as you must, the illegality of the NFL Constitution and By-Laws in the respects adjudged by the Court, plaintiff has sustained injury to his business which can be said to have been proximately caused by reason of such combination of defendants . . . ." (Tr. 3403).

The court further instructed that it had held the player selection draft (Tr. 3394-95) and the Rozelle rule (Tr. 3397-98) to be illegal in themselves, as restraints on competition for employee services; and it instructed that three other NFL rules, *i.e.*, the "tampering" rule, the powers of the NFL Commissioner ("one-man rule"), and the Standard Player Contract had been held illegal only "insofar as they are used by the National Football League" to enforce the draft or the Rozelle rule (Tr. 3398-3401), which "involve illegal antitrust restraints on [NFL club] competition for player services." (Tr. 3401). These instructions were based upon the court's summary judgment decision and were in accord with its Pre-Trial Order.

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(footnote 8 continued)

that cannot be touched anywhere by any court in the United States." (Tr. 3333).

Although petitioner's counsel proposed a number of these instructions, and embraced the remainder prior to the jury's verdict, he challenged virtually all of the instructions in the Court of Appeals. That court, after a careful review, rejected each of petitioner's challenges.

The court therefore presented to the jury the question of whether the draft, Rozelle rule, or any implementing practices had been used for anticompetitive purposes and had proximately caused "some damage to [Kapp's] business." (Tr. 3411, 3412). Finally, the court followed its summary judgment decision in declining to instruct that the player contract itself was *per se* illegal, but instructed that standard contracts could be used depending on whether their terms were reasonable or unreasonable. (Tr. 3411).

The Court also directed the jury to resolve the factual dispute as to whether the two memos were intended to constitute the complete agreement of the parties or whether, as contended by respondent Patriots, the memos were to be incorporated into the Standard Player Contract. The Court properly permitted the jury to consider custom and usage (*e.g.*, all players had theretofore signed a Standard Player Contract, petitioner knew there was such a requirement and had himself always done so without protest in the past) in resolving the issue as to the intention of the parties and not, as petitioner now argues, to determine whether the Standard Player Contract was "indispensable to professional football." (Pet. at 23).

In affirming, the Court of Appeals properly noted that the "requirement of cause and effect or 'impact' was not new in this litigation when the jury instructions were proposed" and that the District Court's Pre-Trial Order had "advised all counsel that the impact of the NFL's alleged unlawful rules would have to be shown" by petitioner. (App. A. 7, 586 F.2d at 648.) The Court of Appeals also properly applied basic antitrust principles in holding that the issue of impact or injury was a fact question for the jury—and that the evidence



supported respondents' contention "that for personal reasons of his own Kapp had decided to discontinue playing football, that he had decided to seek less strenuous employment in the entertainment field, that his only interest in professional football now lay in attempting to recover threefold any financial loss he may have suffered through his election not to play." (App. A. 8, 586 F.2d at 648-49.)

#### REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is in full accord with settled antitrust principles, is not in conflict with any decision of this or any other court, and presents no "special and important" reasons for granting the writ. A reopening of the jury's verdict would contribute to no changes in any NFL employment practice. Nor could a reversal of the jury's verdict and a retrial give recognition to any additional sports league employee right or to any legal principle not presently settled by decisions of this and other courts.

The verdict and the judgment here stand simply for the proposition that private antitrust claims must be based on proof of impact and injury caused by an unreasonable trade-restraining act of defendants. The fact of injury is an essential element of each plaintiff's proof under Section 4. This is settled antitrust law. *E.g.*, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649-50 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-02 (1962); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970), *cert. denied*,

400 U.S. 1001 (1971). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977). The jury had every reason to conclude that the fact of injury was not proven by petitioner—as did the District Court (on post-trial motion) and the Court of Appeals. Further, the full Court of Appeals, on petition for rehearing and suggestion for rehearing *en banc*, found no reason—legal or factual—to disturb this conclusion.

Neither the District Court nor the jury ever concluded that petitioner had been "boycotted"—or had any reason to do so. The District Court, in its summary judgment decision, found both the draft and the Rozelle rule to be unreasonably restrictive. Other League employment practices were found to be unlawful "only insofar as" they might be used to apply the draft and the Rozelle rule. But these simply represented abstract findings of antitrust violation. The District Court never held that the defendants had "boycotted" plaintiff—either in 1971 or at any other time. And, on the sharply disputed fact record before it, the District Court did not—and could not—conclude that any illegal practice of the League had, in fact, injured the petitioner. Petitioner had no objection to any of these rulings of the trial court until the trial evidence turned against him.

Petitioner's suggestion that the Court of Appeals' decision has far-reaching consequences because his situation is supposedly equivalent to that of an individual suing for denial of employment under Title VII of the Civil Rights Act is quite far-fetched. The entire premise of petitioner's contention—namely, that he was "boycotted" and driven from his employment, is not only unfounded; this issue of impact was precisely the

issue of fact that was properly submitted to the jury and resolved against the petitioner by the jury. The Court of Appeals' ruling has no broad implications—for the legal principles applicable to employees in professional sports or otherwise.

The District Court's decision to leave to the jury the contract dispute as to the intention of the parties was wholly to petitioner's advantage in light of the overwhelming evidence that the memos were intended by no one as the complete agreement. The Court's instructions with respect to the contract issues were clearly supported by state and federal law and are wholly undeserving of any review by this Court.

Petitioner's characterizations of the facts of this case and petitioner's position on the controlling legal principles have varied broadly throughout this litigation. Petitioner's current effort to make a further jury argument or to postulate issues not presented by the proof does not make an issue worthy of review by this Court. The fact findings of the jury represent a complete answer to all of petitioner's contentions.

# CONCLUSION

The Petition should be denied.

Respectfully submitted,

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